

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SUPERIOR DISPATCH, INC.,

Plaintiff and Appellant,

v.

INSURANCE CORPORATION OF
NEW YORK,

Defendant and Respondent.

B204878

(Los Angeles County
Super. Ct. No. NC037014)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 21, 2010, is modified as follows:

1. On page 9, at the end of footnote 4, insert the following before the period:
(see fn. 9, *post*)
2. On page 18, at the end of heading 3, beginning “Inscorp Is Entitled,” insert a new footnote 9 after the word “Application” (which will require renumbering of all subsequent footnotes), with the footnote reading as follows:

⁹ We requested supplemental briefing on whether the defense of a misrepresentation or concealment in the insurance application would support affirming the summary judgment in whole or in part. Thus, we afforded the parties an opportunity to present their views on the pertinent issues pursuant to both Government Code section 68081 and Code of Civil Procedure section 437c, subdivision (m)(2).

3. On page 20, delete the first full paragraph, beginning “Superior alleged,” and insert the following in its place:

Superior alleged in its original complaint that it routinely hauled “autos, dump trucks and other vehicles” and that it fully disclosed this fact to RSI. Superior’s fourth amended complaint omits these specific allegations and alleges more generally that the information listed on the application concerning the commodities hauled was “false.” Inscorp presented the allegation from the original complaint as evidence in support of its summary judgment motion and requested judicial notice of the complaint. Superior neither objected to this evidence orally at the hearing nor filed separate, written evidentiary objections in compliance with California Rules of Court, rule 3.1354. Instead, Superior argued in its separate statement of disputed and undisputed facts that the prior allegation was superseded and therefore inadmissible. Superior also opposed the request for judicial notice.

4. On pages 20 and 21, delete the last paragraph on page 20, beginning “A party objecting,” and delete the subsequent paragraph on page 21, beginning “In addition,” and insert the following in their place:

A party objecting to evidence presented on a summary judgment motion must either object orally at the hearing or timely file separate, written evidentiary objections. (Cal. Rules of Court, rules 3.1352, 3.1354.) We conclude that by failing to timely

object in the manner required by the California Rules of Court, Superior waived its objections to this evidence. (Code Civ. Proc., § 437c, subd. (b)(5).) In addition, Superior presented no evidence to show that the prior allegation was mistaken, inadvertent, or untrue. Accordingly, the uncontroverted evidence shows that Superior routinely hauled motor vehicles and that the representation in the application that Superior hauled only produce, food goods, canned goods, beer and wine, textiles, and paper products was false.

5. On page 22, delete the first full paragraph, beginning “The unfair competition,” and replace it with the following:

The unfair competition count incorporates the allegations of the prior counts and alleges that those same acts constitute unlawful, unfair, and fraudulent business acts or practices. The unfair competition count also alleges that Inscorp falsely advertised and made misrepresentations concerning its familiarity with the drayage business and that it failed to disclose the contractual limitations period as required by section 2695.4, subdivision (a). A private person has standing to sue for relief under the unfair competition law only if he or she “has suffered injury in fact and has lost money or property as a result of the unfair competition.” (Bus. & Prof. Code, § 17204.) The alleged injury here relates to Superior’s failure to obtain indemnity under the policy. Our conclusion that the policy is invalid compels the conclusion that Superior has suffered no cognizable injury or loss of money or property as a result of the alleged unfair competition. Accordingly, we conclude that the summary adjudication of the unfair competition count was proper.

The petition for rehearing is denied.

There is no change in the judgment.